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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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92-90

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No.
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REPLY COMMENTS OF SECURITIES INDUSTRY ASSOCIATION

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Summary

The Commission's NPRM drew comments from almost 200 parties. While some commenters questioned the need for regulation at this time, most of the parties expressing a preference favored a company-specific do not call ("DNC") mechanism over the Commission's other options.

SIA believes that a company specific DNC mechanism, while clearly placing significant burdens on its members, may allow the Commission to fulfill its obligations under the TCPA. Any regulations, however, should be flexible and allow telemarketers to develop individualized systems that best fit their telemarketing practices. Furthermore, time-of-day restrictions may also be in accordance with the Commission's mandate, although the Association remains concerned about potential future attempts to tighten the rules to include more restrictive calling hours.

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REPLY COMMENTS OF SECURITIES INDUSTRY ASSOCIATION

Securities Industry Association ("SIA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.[1] SIA continues to believe that two options contained in the NPRM may allow the Commission to successfully fulfill its obligations under the TCPA without placing unreasonable burdens on legitimate business activities. SIA believes that a company specific do not call[2] ("DNC") approach may achieve the Commission's goals as long as it is implemented in a flexible fashion. In addition, the time-of-day restrictions, as proposed by the Commission, could also effectively limit unwanted solicitations, although SIA remains concerned about potential future attempts to tighten the rules to include more restrictive hours of calling.

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[1] Telephone Consumer Protection Act of 1991 CC Docket No. 92-90 (released April 17, 1992).

[2] Some commenters refer to this type of system as an "in-house suppression" system.

I. ADOPTION OF A COMPANY SPECIFIC DO NOT CALL LIST MAY ALLOW THE COMMISSION TO FULFILL ITS OBLIGATIONS UNDER THE TCPA

About 200 parties filed comments in response to the Commission's NPRM. The parties varied significantly in scope, including local exchange ("LECs") and interexchange carriers, financial institutions, major retailers, consumer groups and state agencies. Of the parties addressing the live operator telephone solicitation section of the NPRM, the majority believes that the least restrictive of these alternatives was a company-specific DNC list. These parties believe that a DNC mechanism, while burdensome on many legitimate telemarketers, does have some advantages over the other options proposed by the Commission. The comments also discuss in great detail some of the other options contained in the NPRM, and why these options would prove ineffective and burdensome for telemarketers and consumers.

The Commission should recognize, however, that a DNC mechanism would place significant burdens on many service companies engaged in telemarketing. Many large service corporations have thousands of individuals engaged in telephone solicitation nationwide with service areas that are not rigidly defined. Maintaining and updating accurate internal lists and communicating to their employees in a timely fashion would impose on these companies significant burdens and costs.

Should the Commission adopt a DNC list, it must be careful to afford companies maximum flexibility in establishing their individual systems. Some companies might choose to keep DNC lists by telephone number alone. Others might decide to keep the list by telephone subscriber name and number. Some companies might choose to computerize their systems to alert employees nationwide, while others may choose to circulate the list to all telemarketers by fax machine. These are difficult questions which should be left to the individual company. The Commission should not attempt to mandate the specific procedures for a DNC system but should leave companies free to determine the specific measures best suited to them for implementing the required policies.[3]

For example, if a company specific DNC system is adopted, the Commission should consider the following kinds of broad, general requirements in lieu of detailed regulations and submissions to the Commission:

1) the company will have written guidelines for its DNC program;

2) employees will be trained in the DNC program;

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[3] In 1991, the Commission received only 74 complaints regarding unsolicited live operator telephone calls. Thus, overly restrictive, burdensome requirements would seem unnecessary in light of this lack of consumer dissatisfaction.

3) the telephone number of consumers who clearly request not to be called again will be kept on a "do not call" list for two years;

4) the company will certify annually that these requirements are being met.

Whatever system is adopted by the Commission, it must insure that the regulations constitute reasonable practices and procedures as provided for under the Act.[4] This will ensure that telemarketers complying with the Commission's rules will be afforded an affirmative defense in the event complaints are brought against them.

Another concern of SIA and its members is how companies with many affiliates and diverse product lines will be treated. The regulations should not place any company at a disadvantage in telemarketing simply because of its size or diversity. Many securities firms have affiliates that span numerous product lines, with different management structures making coordination among affiliates impractical. Indeed, if flexibility is not provided for, a company specific DNC may be more costly and burdensome than other options. The regulations for a company-specific DNC system, if adopted, should flexibly address this problem, so as not to discriminate against product-diverse corporations.

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[4] Section c(5) provides telemarketers with an affirmative defense in any legal action if it has established "reasonable practices and procedures."

A. Constitutional Considerations

The TCPA called for a balancing of individuals' privacy interests, public safety interests, and commercial freedoms of speech and trade. SIA is concerned about the potential for excessive governmental restrictions on commercial speech under this statute.

The Supreme Court has stated that "the 'public interest' standard necessarily invites reference to First Amendment principles." FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (citations and quotation marks omitted). Those principles counsel against broad content-based and speaker-specific restrictions on telemarketing. At a minimum, the Commission's limitations will almost certainly have to pass muster under the test established in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). In its most recent iteration, that test seeks to assess whether the asserted governmental interest justifying the regulation is "substantial"; whether the regulation "directly advances" that interest; and whether it does so in a manner that is a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." Board of Trustees of

State University of New York v. Fox, 492 U.S. 469, 480 (1989).[5]

A recent court of appeals decision, now under review by the Supreme Court, illustrates the problematic nature of overly restrictive limitations on telemarketing. In Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991), the Eleventh Circuit struck down as unconstitutional Florida's ban on in-person solicitation by CPAs. (Significantly, "in-person solicitation," as defined by Florida's statute, specifically included uninvited telephone calls.) Even the "need to preserve and protect the public's ability to rely on the independence and objectivity of CPAs" was, in the court's view, insufficiently substantial to warrant such a severe restriction on solicitation. Florida's regulation was clearly unconstitutional because it was "not content-neutral," but rather was "a speaker-specific, unqualified ban on a category of expressive activity."

In addition, if the Commission were to distinguish between telemarketers, it might run afoul of prohibition on restrictions that "favor[] certain classes of speakers over others." Minneapolis Star and Tribune Co. v. Minnesota

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[5] Indeed, if the FCC's restrictions were adjudged to be either content-based or speaker-specific, they might well be measured against the much tougher test which permits only those restrictions which serve compelling state interests. See, e.g., Pacific Gas & Electric Co. v. Public Utils Comm'n, 475 U.S. 1 (1986).

Commission of Revenue, 460 U.S. 575 (1983). Under the First Amendment, such rules are inherently suspect, Home Box Office, 567 F.2d at 48, and the Constitution "places a heavy burden on the [government] to justify its action." Minneapolis Star, 460 U.S. at 592-93. Were the Commission to adopt discriminatory policies without a legitimate basis for the distinctions it draws, it could raise serious questions concerning the "intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." News America Pub. Inc. v. FCC, 844 F.2d 800, 844 (D.C. Cir. 1988).

As the Commission balances privacy interests with the rights of commercial speech, the Commission must be mindful of these Constitutional considerations with respect to telemarketing. They place a heavy burden on the Commission to regulate carefully in this area.

II. THE COMMENTS DEMONSTRATE THAT OTHER ALTERNATIVES SUGGESTED BY THE COMMISSION ARE TOO EXPENSIVE, INFEASIBLE OR WOULD PLACE OVERLY BURDENSOME REQUIREMENTS ON TELEMARKETERS

A. Commission Adoption of a National Database Would Impose Unreasonable Burdens on Telemarketers

The comments clearly outline the significant burdens and outrageous costs associated with a national database.

AT&T estimates that creation of such a database would cost between $24 and $80 million, depending upon the complexity of the system.[6] Household Finance predicts that establishment of the database would be at least $50 million, and "may reach up to $100 million."[7] Indeed, even the Commission's own estimates suggest that a database could cost up to $6 million.[8]

Obviously, these costs could have a devastating effect on legitimate businesses, and would be prohibitive for small companies engaged in a limited amount of telemarketing. Adoption of such a costly system is also clearly inconsistent with the President's mandate to the Commission to adopt regulations that result in the least possible cost to the economy.[9] Furthermore, SIA questions the success of such a system without the full support and participation of the LECs. Because it is likely that consumers will most often direct inquiries regarding telephone solicitations to their local telephone company, LEC cooperation is essential to educate consumers on how to be included in a database and for the development of an effective, nationwide system. It is

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[6] Comments of AT&T at 12.

[7] Comments of Household International at 12.

[8] See Telephone Advertising Consumers Rights Act, H. Rpt. No. 102-317, 102d Cong., 1st Sess. (1991) at 22.

[9] See Statement by the President, December 20, 1991.

clear from the comments that many LECs, however, do not want to participate in any form in adopting such a system.[10]

None of the commenters favoring a national database submitted detailed proposals on how such a system might be created, or provided in-depth cost analysis and rate structures. For example, LeJeune suggests that "[p]rivate companies could profitably administer a national database funded solely through charges to telemarketers"[11] and predicts annual revenues of approximately $2.5 million.[12] Moreover, LeJeune suggests that the Commission issue a request for proposals ("RFP") to select an entity to administer the database, and that the consumer could be notified via their billing statement of the existence of the database, thus allegedly placing minimal burdens and costs on the LECs.

Based on other comments submitted in this proceeding, SIA believes that LeJeune's proposal is overly simplistic and does not accurately reflect the true financial commitments associated with the creation of a national database. For

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[10] See U.S. West at 8-9 (suggesting that telemarketers advertise the existence of such a system on television and radio) and SNET at 2 (stating that whatever rules are adopted, telemarketers should be solely responsible for its implementation).

[11] Comments of LeJeune Associates of Florida at 20 (LeJeune provides telephone equipment and software to the telemarketing industry).

[12] Id. at 21.

example, nowhere does LeJeune predict the costs associated with the creation and establishment of the database, or how these costs would be apportioned among telemarketers. Furthermore, it is SIA's belief that consumer notification regarding the database via LEC billing statements would be a costly process for the carrier. In addition, the Commission has already stated its finding that any system adopted should not involve the Federal government. Issuance of an RFP would seem inconsistent with the Commission's intent.

Another proponent of a national database system is InterVoice, Inc. InterVoice suggests that the Commission license companies engaged in telemarketing, making monthly subscription to the database a requirement of maintaining the license.[13] While this might amount to a large revenue-raising process for the database administrator, SIA believes that Commission licensing of telemarketing is unnecessary, impractical and beyond the Commission's legal authority.

Neither the TCPA nor the Communications Act[14] gives the Commission authority to license companies engaged in telephone solicitations. In order for the Commission to license non-carriers, it must find that telemarketers provide service that is ancillary to the provision of wire or radio communication service. Clearly, no ancillary service exists

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[13] InterVoice at 9.

[14] 47 U.S.C. § 151 et. seq. (1988).

here. Moreover, the Commission's current financial and administrative limitations would certainly prevent such a suggestion from being practical.[15]

In essence, of the few proponents of a national database, none provided the Commission with a detailed and realistic scheme of how such a system would be created. SIA urges the Commission to refrain from enacting this broad, sweeping approach to restricting telemarketing to consumers.

B. The Comments Do Not Support Adoption of Special Telephone Directory Markings

As demonstrated in the comments, a special directory markings approach would create difficult compliance problems for companies engaged in telemarketing on a nationwide basis.[16] Indeed, as recognized by NYNEX, special directory markings are often ineffective because telemarketers use a variety of sources for their marketing lists.[17] Moreover, because "telephone numbers frequently are reused and reassigned, this regulatory scheme would likely prove very

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[15] Moreover, the securities industry is already heavily regulated and licensed at the national and state level, so that further licensing for telemarketing would be pointless.

[16] See Comments of JC Penney at 24 (use of local phone company directories to 'mark' objectors would doubtless be a most difficult method of implementing the 'objector' concept.)

[17] Comments of NYNEX Telephone Companies at 9.

difficult to accurately maintain and update,"[18] resulting in customer confusion and dissatisfaction. Finally, "directory markings deprive consumers of the ability to choose between calls they wish to receive and those they do not."[19]

According to the LECs -- who maintain primary responsibility for publishing telephone directories -- the costs associated with such a system would be prohibitively expensive. Ameritech estimates that the development and implementation of such a system could cost up to $70 million for the first year. NYNEX discusses in great detail the numerous changes that LECs would have to undertake in order to successfully implement a directory marking system.[20] It is obvious that these changes to the telephone directory systems would be burdensome and costly for the LECs and their local ratepayers.

C. Network Technologies Cannot Adequately Protect Consumers From Unwanted Telephone Solicitations

While SIA lacks significant expertise in the area of telephone network technologies, it is important to note that all of the local and interexchange carriers filing comments in this proceeding believe that the current telephone network

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[18] Comments of Association of National Advertisers at 5.

[19] Comments of American Express Company at 15.

[20] See Comments of NYNEX Telephone Companies at 10-14.

cannot support blocking options for telemarketers at this time. Based on the comments, it would seem that the proposals contained in the Commission's NPRM would be costly to implement and extremely burdensome on the local exchange carriers, who may be forced to upgrade or replace equipment to effectuate the proposal. For instance:

- NYNEX states that while "network technology exists that enables subscribers to block unwanted calls . . . this capability is technically limited, not ubiquitous, and only available at an additional charge to the subscriber. Therefore in the view of the NTCs, it does not present a satisfactory alternative."[21]

- PacTel states that "utilizing the public switched network to block telemarketing calls is problematic."[22]

- GTE suggests that "while some network technologies can assist in screening unwanted calls, network blocking via the numbering plan would not work."[23]

III. CONCLUSION

SIA urges the Commission to carefully consider the comments submitted in this proceeding. They clearly demonstrate the overwhelming deficiencies in some of the regulatory options contained in the NPRM, except for two -- the company specific DNC system and the time-of-day restrictions. SIA believes that adoption of a flexible

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[21] Id. at 14.

[22] Comments of Pacific Bell and Nevada Bell at 12.

[23] Comments of GTE Service Corporation at 15.

company specific DNC approach would allow the Commission to fulfill its obligations under the TCPA. Furthermore, imposing a 9:00 a.m. to 9:00 p.m. calling restriction on telemarketers is not unacceptable, but the Association remains concerned that such an approach might evolve by further regulation into a tighter restriction and thus present a grave threat to its members.

RESPECTFULLY SUBMITTED

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